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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 384

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BRIEF FOR RESPONDENTS POWER AUTHORITY OF THE STATE OF NEW YORK AND ROBERT MOSES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Petitioner,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS POWER AUTHORITY OF THE STATE OF NEW YORK AND ROBERT MOSES IN OPPOSITION

Opinions

The opinion of the District Court is set forth in Appendix C to the Petition. The opinion of the Court of Appeals for the Second Circuit is set forth in Appendix A to the Petition; and that Court's order denying rehearing and modifying the stay provisions of its judgment is set forth in Appendix B to the Petition. The opinion and order of Mr. Justice Harlan on petitioner's application for stay of the mandate of the Court of Appeals is contained in Appendix A to this brief. None of these opinions or orders has been reported.

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in the petition.

Constitutional Provisions; Treaties, Statutes and Orders Involved

Involved on this application are:

1. The provisions of the United States Constitution, Article I, Section 8.

2. Treaty of October 22, 1784 between the United States and the Six Nations, 7 Stat. 15.

3. Treaty of November 11, 1794 between the United States and the Six Nations, 7 Stat. 44.

4. Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a.

5. Federal Power Act, Sections 3(1), 3(2), 4(e), 21, 313; 16 U. S. C. Sections 796(1), 796(2), 797, 814, 825*l*.

6. Act of July 22, 1790, 1 Stat. 137.

7. Act of March 1, 1793, 1 Stat. 329.

8. 25 U. S. C. Section 177, Act of June 30, 1834, 4 Stat. 724.

9. 25 U. S. C. Section 233, Act of September 13, 1950.

10. New York Public Authorities Law, Sections 1007, 1008.

11. New York Highway Law, Section 30.

12. Order of the Federal Power Commission issued January 30, 1958, licensing Project No. 2216.

13. Order of the Federal Power Commission issued March 21, 1958 denying petitioner's application for rehearing on the January 30th order.

14. Order of the Federal Power Commission issued May 5, 1958, approving "Exhibit J" of the license application.

The most pertinent parts are set forth in Appendix B of this brief.

Questions Presented

1. Should condemnation pursuant to a declaratory judgment of the Court of Appeals, Second Circuit, entered in this action brought by petitioner, of land necessary for the Niagara Power Project, the construction of which has been mandated by Congress and declared by Congress to be of an emergency character, be stayed pending the redetermination of the issues in this action by the District of Columbia Circuit in a proceeding to review an order of the Federal Power Commission granting the license for the Project (which in no event aggrieved petitioner), the petition for review having been filed after the commencement of this action and the certified transcript of the record upon which the Commission's order was based having been filed with the Court of Appeals for the District of Columbia after the District Court entered judgment in this action?

2. Has respondent, Power Authority of the State of New York, a licensee of the Federal Power Commission and a corporate municipal instrumentality and political subdivision of the State of New York, the right to acquire, by the exercise of the right of eminent domain for public use in connection with its Niagara River Power Project lands owned in fee by petitioner as a result of purchase from non-Indian, non-governmental owners?

Statement

The petition for certiorari makes it clear that what is primarily sought is not a review of the judgment below on the merits, but rather a further stay of proceedings for the condemnation of petitioner's lands which are vitally and urgently needed for the Niagara Power Project. This being within the Court's discretion, we deem it necessary to apprise the Court at some length of the history of the litigations between petitioner and respondents and of the practical situation involving the construction of the power project, including the consequences which will ensue from further delay in the availability of petitioner's lands.

The facts which we shall summarize here are presented in detail in documents which are included in the record below.

Public Law 85-159, 16 U. S. C. § 836, was enacted August 21, 1957. It mandated the Federal Power Commission to issue a license to respondent Power Authority of the State of New York for a power project capable of utilizing all the water of the Niagara River available to the United States by international agreement. It directed that the license be issued pursuant to the Federal Power Act but that it contain conditions prescribed in the enabling statute, one of which requires that power be sold at the lowest price reasonably possible.

The 1957 legislation ended a dispute in Congress with respect to what entity should build the project which had been carried on since the negotiation of the 1950 Treaty with Canada (1 U. S. T. 694; T. I. A. S. No. 2130) making additional water of the Niagara available for power purposes. In recommending the 1957 legislation the Public Works Committees of both Houses of Congress indicated that they were doing so because of the grave emergency which confronted the Niagara Frontier because of the destruction on June 7, 1956 of a huge generating plant of the Niagara Mohawk Power Corporation which had theretofore used a good part of the Niagara water to produce power essential to the electrometallurgical and electrochemical industries upon which the whole economy of the area is based and which are vital to the defense of the country (Sen. Report 539, 85th Cong. 1st Sess.; H. R. No. 862, 85th Cong. 1st Sess.). Congress had before it the Power Authority's plan of development for the largest hydroelectric power project in the United States with an installed capacity of 2,190,000 kilowatts. Because the 1950 Treaty requires that more water be allowed to go over the Falls for scenic purposes in the daytime than at night during the long tourist season and therefore makes more water available for power purposes at night, a reservoir of 60,000 acre feet is necessary to store water nights and weekends when there is least demand for power for use

during the day five days a week when power is most needed. Without such a reservoir full practical use could not be made of all the water available to the United States and only about half the power potential could be realized. Such a reservoir will cover approximately 2,600 acres of land.*

As the Senate Report points out, by using the reservoir the project will have a firm capacity of 1,800,000 kilowatts and will produce about 13,000,000,000 kilowatt hours of energy annually. The total cost of the project will be about $700,000,000 which must be raised through the sale of bonds by the Power Authority which is a "corporate municipal instrumentality" and a "political subdivision of the state, exercising governmental and public powers" but has no State or Federal credit. The sole security behind the bonds will be revenue from the sale of power.

The Authority has borrowed $100,000,000 from banks in anticipation of an initial bond issue of $200,000,000 now being prepared for offering to the market. It has let contracts for construction work and equipment totalling nearly $400,000,000. Work is now in progress and the integrated schedule, each part of which depends upon each other part, calls for the production of power in February, 1961. Each day's delay in completion will add about $72,000 to the cost of the project because of interest charges during construction alone. Serious delay will result unless possession of petitioner's land is obtained in October. (R. 79, 80, 82-86)

The Federal Power Commission issued a preliminary license in September, 1957, but thereafter in a series of hearings entertained objections on the part of the Town of Lewiston and petitioner with respect to the size and location of the storage reservoir. The Town demanded that the reservoir be made smaller than planned and petitioner demanded that the Commission direct that no part

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* The statement in the House Report quoted in the opinion of the Court of Appeals below to the effect that the reservoir will have a surface area of 850 acres was a clerical error. Material furnished to both Houses indicated that the reservoir would be of the larger size.

of its land be taken for project purposes. Petitioner claimed that treaties barred the taking. Members of the Tuscarora Nation appeared and testified. The Nation formally intervened in the proceeding and filed a brief through its present counsel.

Petitioner's reservation is in the Town of Lewiston on the outskirts of the City of Niagara Falls, New York, near the Niagara River. It consists of three separate parcels aggregating about ten square miles (6,249 acres) and is inhabited by about 700 people of whom about 540 are members of the Nation.

The Western New York area in which the Niagara Power Project and petitioner's lands are included was claimed and held by the Seneca Indians from the middle of the seventeenth century until after the Revolution (*Seneca Nation* v. *Christie*, 126 N. Y. 122 (1891)). The Tuscarora Indians emigrated from North Carolina to Central New York beginning about 1714 and lived there with the Oneidas. In 1781, or a few years thereafter, a very small number of them who were adherents of the British squatted on the northeast corner of their present reservation (Parcel A, Map, centerfold), by sufference of the Senecas. Others joined them, so that by 1797, about 300 lived there. By that time the Senecas had sold the Indian right of occupancy in the area to the Holland Land Company, owner of the right of preemption as grantee of Robert Morris, who in turn was grantee of Massachusetts, which under the 1786 Hartford Compromise between Massachusetts and New York was conceded to have obtained such preemptive right as successor to the King of England. The sale by the Senecas was in conformity with the 1794 Treaty of Canandaigua or Pickering Treaty (7 Stat. 44) and was made under the auspices of the United States.

Despite the sale in 1797 at what is known as the "Treaty of Big Tree", the Holland Land Company permitted the Tuscaroras to continue to occupy the original square mile upon which they had settled and two additional square miles upon which they had spilled over (Parcel B, Map,

centerfold). There was no formal conveyance but the Company and its grantees have ever since recognized this right of occupancy. Later the Senecas gave the Tuscaroras what purported to be a deed to one of the three square miles.

In 1804 the Tuscaroras purchased an additional 4,329 acres from the Holland Land Company (Parcel C, Map, centerfold). The purchase was made with money which they obtained from the sale of lands in which they still had rights in North Carolina. This interstate transaction was carried out through the good offices of Henry Dearborn, Secretary of War. The Company deeded fee title to the land to Dearborn in trust for the Tuscarora Nation under an arrangement by which he was to reconvey it to the Tuscaroras when the full purchase price had been paid. This was done in 1809 and since that time the Nation has held fee title to the land. When Dearborn sent the deed to the Nation, he advised that it would be well for them to petition the Legislature of the State of New York for authority "to hold their lands in a national capacity." The newly-acquired lands were taxed for several years, although Parcels A and B were not. In 1820 the Nation petitioned the New York Legislature for relief from taxes on Parcel C and by Chapter 146 of the Laws of 1821 such exemption was granted by the State.

The 1,383 acres of land sought by the Power Authority is solely within this purchased Parcel C (Map, centerfold).

The 1784 Treaty of Fort Stanwix (7 Stat. 15) and the 1794 Treaty of Canandaigua (7 Stat. 44) had covered this land. The 1794 Treaty superseded the 1784 Treaty with respect to it and the force of the 1794 Treaty, by its terms, was spent upon the sale by the Senecas of their rights of occupancy in 1797. Hence, there is no treaty which applies to the land which is the subject of this action.

At the time of the Commission hearings the lands which the Authority planned to use for the project features, including the reservoir, were shown on a tentative "Exhibit J" to its application for a license which had been

prepared without the benefit of surveys. This Exhibit was put in evidence at the hearing (Matter of Power Authority of the State of New York, Project No. 2216, Tr. 617-618) and indicated that approximately half the reservoir would be on petitioner's land, some of it on Parcels A and B, but the bulk of it on Parcel C (Map, centerfold).

On January 30, 1958 the Commission made an order issuing a license (which superseded the preliminary September license) to the Authority and approving its general plan for the reservoir. The Commission ordered that the reservoir have a capacity of 60,000 acre feet and an area of about 2600 acres, but refused to pass on the question of whether or not any of petitioner's lands could be taken. It observed that "[t]he lands of the Indian nation are almost entirely undeveloped except for agricultural use" and took the position that "other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive." (Appendix, p. 12a).

There was nothing in the record before the Commission to show how much more expensive alternative lands would be or to show the impracticability of moving the reservoir due to the contour of the earth in one direction and the existence of a populated community in the other. (*cf.* Record in Court of Appeals, 212).

The order prescribed that a later determination would be made of what lands were to be included in the project and directed Authority to file with the Commission for approval at a later date revised exhibits including a revised "Exhibit J" showing the precise lands to be taken.

On March 21, 1958 the Commission entered an order denying an application made by petitioner for rehearing on the January 30, 1958 order and again refused to direct that petitioner's land be excluded from the project, stating that while the best location for the reservoir required some of petitioner's land, the question of its availability was for a court and not for the Commission to decide, and was one on which the Commission was not required "to render an advisory opinion." In this order the Commis-

sion also overruled a contention which petitioner had made for the first time in its application for rehearing, to the effect that the Commission in issuing the license had failed to follow procedures contained in Section 4(e) of the Federal Power Act with respect to use of a reservation of the United States. The Commission held that petitioner's lands are not part of a "reservation", as the term is defined in Section 3(2) of the Act.

On May 1, 1958 the Authority submitted to the Commission a revised "Exhibit J" to its application. (Appendix C). This revised exhibit showed that the reservoir would be located in such a way as to take in the 1,383 acres of petitioner's Parcel C which are the subject of this action. This was somewhat more Indian land than was shown on the previous "Exhibit J" which had been before the Commission when it had held its hearings and issued its January 30 order. The revised exhibit showed that no land would be taken from Parcels A and B, as had previously been planned (Map, centerfold). Rather, the only Tuscarora land to be taken would be a portion of Parcel C which could not conceivably be held to be covered by any Treaty.

On May 5 the Commission entered an order approving the revised "Exhibit J" and served a copy of that order on petitioner together with notice that it would become effective in 30 days unless a rehearing was demanded within that time. Under Section 313(b) of the Federal Power Act (16 U. S. C. § 825 *l* (b)), timely request for rehearing is a condition precedent for review by the Court of Appeals.

On May 16 petitioner filed with the United States Court of Appeals for the District of Columbia a petition to review the Commission's order of January 30. It did not, however, request rehearing of the May 5 order and has thus waived its right to obtain a review of that order.

The petition filed with the District of Columbia Circuit asked review of the January 30 order pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825 *l* (b) on the alleged grounds that (1) the Commission did not have power to authorize use of petitioner's lands for the project;

(2) the Power Authority lacks power to acquire such lands "without specific permission from Congress, which permission has not been requested or granted and which cannot be secured through an order of the Commission"; and (3) the January 30 order was defective in its failure to contain findings required by Section 4 (e) of the Federal Power Act, 16 U. S. C. § 797(e) to be made when the Commission issues licenses for projects in reservations as defined in Section 3(2) of the Federal Power Act, 16 U. S. C. § 796(2).

On June 25, 1958 the Commission certified and filed with the Court of Appeals for the District of Columbia a transcript of the record upon which the orders of January 30 and March 21 were based.

In the meantime petitioner had commenced this action on April 18, 1958 and judgment dismissing the complaint had actually been entered in the United States District Court for the Western District of New York, Morgan, J., on June 24, 1958.

This action was brought (1) permanently to enjoin respondents from "taking any actions" to acquire by appropriation (a method of exercising the right of eminent domain under the laws of New York) lands belonging to petitioner, or from entering upon such lands; (2) for a declaratory judgment that respondents have no right, authority or power to acquire "by appropriation or otherwise" any lands belonging to petitioner; and (3) for an order setting aside and vacating all descriptions, maps, notices and other instruments "in connection with the purported appropriation" of petitioner's property.

The complaint states that the action is based upon Section 8 of Article I of the United States Constitution; the Treaty of October 22, 1784 between the United States and the Six Nations, 7 Stat. 15; the Treaty of November 11, 1794 between the United States and the Six Nations, 7 Stat. 44; 25 U. S. C. § 177, Act of June 30, 1834, § 12; and 25 U. S. C. § 233, Act of September 13, 1950.

Prior to the commencement of the action, the State of New York, acting through respondent John W. Johnson,

its Superintendent of Public Works, and on behalf of respondent Power Authority of the State of New York had filed with the Clerk of Niagara County, who is also the Clerk of the Supreme Court and the County Court of that county, a map and description of the property which is the subject of this action. It did so for the purpose of exercising the power of eminent domain granted to the Authority as a licensee of the Federal Power Commission by Section 21 of the Federal Power Act (16 U. S. C. § 814) and in compliance with Section 1007 subdivision 10 of the New York Public Authorities Law and Section 30 of the New York Highway Law. The state statutes provide that such action has the effect of vesting title to the land in the State for the use of the Authority. Other procedural steps necessary to complete the appropriation, preliminary to an award of damages by the New York Court of Claims and the transferring of possession through other court proceedings, had not been taken.*

These steps to acquire the land by exercise of the right of eminent domain were taken to provide the site for the storage reservoir, relocated transmission lines and relocated highways, and to make possible the diversion of creeks partly on the land in question, all of which is necessary in connection with Power Authority's Niagara River Power Project.

On June 24, 1958 the United States District Court, Western District of New York (Morgan, J.) dismissed petitioner's complaint, denied petitioner's motion for a permanent injunction, dismissed the temporary restraining order which had been issued against the Power Authority's entry upon the lands involved except for limited purposes of surveying and testing, and denied a motion for a further restraining order pending appeal.

Petitioner obtained a reinstatement of the previous stay with minor modifications from the Court of Appeals and

* The statement in the opinion of Moore, J., in the Court of Appeals (last full sentence on page 17a of Appendix A to petition) describing the appropriation method, was based on a factual misunderstanding of the method.

on July 24 that Court unanimously affirmed the decision of the District Court in so far as it held that the Power Authority has the right to exercise eminent domain over petitioner's land pursuant to Section 21 of the Federal Power Act. It entered a declaratory judgment to that effect. However, with Judge Swan dissenting, it reversed the dismissal of the complaint and set aside the documents used by the State to effect appropriation of the land on the ground that the State appropriation procedure is not one which may be used under Section 21 which provides for the exercise of eminent domain in Federal or State Courts. It requested the District Court in the event a condemnation proceeding were started there to expedite proceedings as much as possible.

The judgment continued the stay previously granted pending "the final determination of this action or any proceeding seeking to acquire the property in question". The Power Authority immediately commenced a condemnation action which is now pending in the District Court for the Western District of New York.

In its brief before the Court of Appeals petitioner had argued that the Power Authority could not take its lands pursuant to Section 21 of the Federal Power Act because the license was void for failure of the Commission to make the findings which Section 4(e) of the Federal Power Act requires to be made when licenses are issued on "reservations". On petition for rehearing of the Court of Appeals' judgment, petitioner for the first time contended that since the validity of the Authority's license with respect to its lands was before the Court of Appeals for the District of Columbia, as a matter of comity the validity of the license should not be assumed by the Second Circuit in advance of a decision by the District of Columbia Circuit, on the theory that the latter has exclusive jurisdiction to affirm, modify or set aside such order in whole or in part (16 U. S. C. § 825*l*(b)).

On August 27, the Second Circuit denied petitioner's petition for rehearing, and, on the basis of a motion made

by the Authority for clarification of the stay provisions of its judgment, ordered that its mandate issue in six days at which time the stay previously granted would cease. In so doing, the Court denied a request contained in the petition for rehearing that the Court withdraw its holding that the Authority was "validly authorized by the Federal Power Commission to exercise the power of eminent domain against appellant's lands, and retain jurisdiction" pending decision by the District of Columbia Circuit in the case pending there.* It also denied petitioner's request that it stay its mandate for ninety days to permit the filing of a petition for certiorari.

Petitioner thereupon sought a stay of the Court of Appeals mandate from Mr. Justice Harlan of this Court pending decision on petition for certiorari. On September 8 Mr. Justice Harlan denied a stay of the mandate but in effect stayed condemnation proceedings in the District Court except with respect to land immediately necessary for the building of transmission lines.

On September 15 the District Court for the Western District of New York, Burke, J., granted the Power Authority's motion for immediate possession of approximately 85.6 acres of petitioner's land for the purpose of erecting the transmission lines.

In the meantime on September 3, 1958, respondent, John W. Johnson, Superintendent of Public Works of the State of New York, appealed to this Court from the judgment of the Court of Appeals in this action in so far as it vacated and annulled the title of the State to the lands involved. The appeal was taken pursuant to 28 U. S. C. § 1254(2).

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*On September 17 the Power Authority moved the District of Columbia Circuit to speed up the brief schedule previously set, pursuant to a motion to which it was not a party, under which petitioner had until November 15 to serve its reply brief. Petitioner objected to advancing that date even though the Commission agreed to file its brief on September 29. However, the Court did establish a new briefing schedule and set the case down for hearing on October 28.

I

There is No Merit to Petitioner's Contention that Comity and the Orderly Administration of the Courts Require a Remand of the Case to the District Court with a Stay of Proceedings Pending a Final Decision of the Court of Appeals for the District of Columbia Circuit in a Proceeding Brought by Petitioner to Review the Federal Power Commission's Order of January 30, 1958.

The public interest demands that the Niagara Power Project be completed as soon as possible. Any further delay in the Power Authority's obtaining possession of petitioner's land will subject it to claims from contractors and absolve them from performing their work within the time limits set up in their contracts. Each day's delay in the completion of the project will add materially to its cost and will result in losses to the power-users of the Niagara area of upwards of $100,000 a day. They include the electrochemical and metallurgical industries which, by the direction of Congress (Act of August 21, 1957, 71 Stat. 401), are entitled to a large part of the power output, are vital to the defense of the country and employ virtually all of the industrial workers in the Niagara area; and the municipalities, rural cooperatives and defense agencies to whom Congress gave preference with respect to half the power. (R. 78-86; Record in Court of Appeals 208-215; 216-228; 242)

Petitioner suggests that "scrupulous regard 'for the smooth working of the federal judiciary'" should cause this Court to stay proceedings for the acquisition of petitioner's lands and thus delay the project until a decision of the Court of Appeals for the District of Columbia Circuit in the proceeding brought by petitioner to review the Commission's order of January 30, 1958.

It further suggests that the results of the decision of the Court of Appeals below are "chaotic."

The present procedural situation was brought about by the deliberate acts of petitioner. It delayed—as it conced-

edly had a strictly legal right to do—taking every step which it took to obtain review of Federal Power Commission orders until almost the last moment allowed by law; it failed to seek any review whatever of the one Power Commission order which actually aggrieved it; and when it had a choice of the District of Columbia Circuit and the Second Circuit Court of Appeals, it elected to bring a review proceeding in the District of Columbia despite the fact that it had already commenced an action involving the same issues in a District Court included in the Second Circuit. As late as September 18 it opposed advancing the time for briefs and hearing in the review proceeding.

We deem these facts relevant because that part of petitioner's application which requests a stay is addressed to the discretion of this Court. Also relevant is the fact that the pendency of litigation is interfering with the orderly financing of the Project.

In any event, the application for a stay based on the review proceeding should be dismissed for the reasons which follow.

1. The judgment below holding that respondent is empowered to acquire petitioner's land by eminent domain was validly rendered by a court of competent jurisdiction.

When this action was brought in the District Court, an actual controversy existed between the parties, and plaintiff (petitioner herein) alleged in the complaint that the action was based upon the Constitution, treaties and statutes of the United States. Included in the relief sought was a declaratory judgment that the Power Authority had no right "to acquire by appropriation or otherwise" any lands belonging to plaintiff. At the time the action was brought, petitioner had taken no steps to review any order of the Federal Power Commission.

The District Court clearly had jurisdiction (28 U. S. C. § 1331) and the power to render a declaratory judgment (Rule 57 of the Federal Rules of Civil Procedure; 28 U. S. C. §§ 2201, 2202).

Before entertaining motions by defendants for summary judgment and dismissal of the complaint in this action Judge Morgan asked counsel to submit memoranda on the question of the jurisdiction of the District Court. On May 19, 1958, three days after the filing of the petition to review in the District of Columbia Circuit, counsel for plaintiff (petitioner here), submitted a memorandum sustaining the proposition that the District Court had jurisdiction pursuant to 28 U. S. C. § 1331.

Not only was the petition for review of the January 30 order of the Commission filed after this action had been commenced and issue joined in the District Court, but judgment was rendered in the District Court on June 24, the day before the Commission certified and filed with the Court of Appeals for the District of Columbia Circuit a transcript of the record upon which the orders of January 30 and March 21 were based.

Prior to the enactment of Public Law 85-791, 85th Cong. H. R. 6788 (72 Stat. 947) on August 28, 1958, Section 313(b) of the Federal Power Act provided:

> "(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. *Upon the filing of such a transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.* * * *" (Emphasis added)

The August 28 amendment provided:

> "(b) The second and third sentences of subsection (b) of section 313 of the Federal Power Act, as amended (49 Stat. 860), are amended to read as follows: 'A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. *Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.*'" (Emphasis added)

The amendment makes it clear that under the prior statute, applicable to this action, the District of Columbia Court of Appeals could not obtain any jurisdiction, exclusive or otherwise, until the transcript of the Commission's record was certified and filed with the Court. It is only since the amendment that the Court of Appeals obtains any jurisdiction upon the filing of the petition. It still does not acquire *exclusive* jurisdiction until the filing of the transcript.

The District Court's jurisdiction was determined at the time the action was begun and was not affected by subsequent events. *Smith v. Sperling*, 354 U. S. 91 (1957); *Minneapolis & St. Louis Railroad Co.* v. *Peoria & Pekin Union Railway Co.*, 270 U. S. 580 (1926); *Mullen* v. *Torrance*, 9 Wheat. 537 (1824); *Mutual Life Insurance Co.* v. *Blair*, 130 Fed. 971 (E. D. Mo. 1904); *Ritchie* v. *Burke*, 109 Fed. 16 (N. D. Ohio 1901); *Ex parte Kyle*, 67 Fed. 306 (W. D. Ark. 1895). However, even if such certification and filing could have deprived the District Court of jurisdiction in this action had they occurred before judgment, they certainly could not do so after judgment was duly entered; for judgment was entered at a time when the District of Columbia Court had no jurisdiction whatever.

The facts in this case are completely opposite to the facts in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S.

320 (1958), where the judgment of the Court of Appeals on review of the Commission's order was *res judicata* when the second action was begun.

Here it is clear that the courts below had jurisdiction and were not divested of it.

2. The judgment below is *res judicata* on all issues which were or could have been there litigated.

As stated on page 9, *supra*, petitioner has asked the District of Columbia Circuit to review the January 30 and March 21 orders of the Commission on the alleged grounds that the Commission did not have power to authorize use of petitioner's land, that the Power Authority cannot acquire it and that the January 30 order was defective because of its failure to contain findings required by Section 4(e) of the Federal Power Act in the case of reservations of the United States.

The courts below, of course, adjudicated the Authority's right to take petitioner's land and therefore the Commission's right to license it to do so.

At the hearings on the motions which led to a dismissal of the complaint in the District Court plaintiff (petitioner here) argued that the Power Authority could not take its land pursuant to Section 21 of the Federal Power Act. It repeated this argument in the Court of Appeals and its brief there shows that it based the argument specifically on the ground that its lands constituted a reservation of the United States within the meaning of Sections 3(2) and 4(e) of the Federal Power Act and the Commission had failed to make the procedural finding required by Section 4(e).

Thus petitioner raised and had adjudicated in the District Court and Second Circuit Court of Appeals the very questions upon which it seeks review in the Court of Appeals for the District of Columbia Circuit. The courts below necessarily determined that the contentions had no validity.

The courts below did not purport to pass upon the validity of the Power Authority's license as such nor were they called upon to do so. They did, however, pass upon the only issues upon which review has been sought in the Court of Appeals for the District of Columbia Circuit. Therefore, since the courts below had jurisdiction their determination on those issues is *res judicata* unless reversed by this Court.

3. Even if the judgment below were not *res judicata* on all issues raised in the review proceeding, the stay should nevertheless be denied because the January 30 order of which review is sought in the Court of Appeals did not aggrieve petitioner and therefore the review proceeding must be dismissed on that ground.

As stated on page 8, *supra*, the Commission in its January 30 order licensing the Niagara Project, directed that the project's reservoir have a capacity of 60,000 acre feet but refused to pass on the question of whether any of petitioner's land should be included in the Project. It directed that the boundaries of the project be determined later.

In denying the petition for rehearing on March 21, the Commission again refused affirmatively to decide whether or not petitioner's lands could be taken for the project, stating the Authority's right to acquire the lands constituted a question to be resolved by a court of competent jurisdiction, and was one on which it was not called to render an advisory opinion.

On May 5, the Commission approved a revised "Exhibit J" to the Authority's application for a license showing that the Project would include the very land which is the subject of this action, this land being considerably greater in amount and partly in a different location than planned at the time of the hearings which led to the January 30 order.

Although petitioner was served with the May 5 order and was given thirty days in which to apply for rehearing on it, no rehearing was requested, and a court review of it

is therefore barred by the terms of Section 313(b) of the Federal Power Act.

It is clear that petitioner was not aggrieved by the January 30 order of which it seeks review in the District of Columbia Circuit. In fact, in applying for rehearing of that order, its only claim of being aggrieved was that it was

> "aggrieved by the order of January 30, 1958, by the mere fact that its property may be included in the Niagara Project."

It stated:

> "* * * even though the Commission apparently sought to avoid that result, issuance of the license may be construed as giving Federal consent to the acquisition of Petitioner's lands * * * particularly in the light of Section 21 of the Federal Power Act, * * *"

If petitioner was aggrieved it was by the May 5 order, which is not before the District of Columbia Circuit.

The order of the Federal Power Commission under consideration is not one of which the petitioner has standing to prosecute a review under Section 313(b). It is well settled that not everyone who appears before the Commission in a hearing which results in an order is entitled to have that order reviewed under 313(b). Interlocutory orders are of course beyond review. *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 450 (D. C. Cir. 1942). Nor is an order which merely suggests action within its purview. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938). It must be a definitive adjudication changing a petitioner's present or future status. *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), which dealt with an identical review provision in the Natural Gas Act. Moreover, even a finding of the Commission (not the present case) is beyond review unless an order is issued based on the finding. *Carolina Aluminum Co.* v. *Federal Power Commission*, 97 F. 2d 435, 436 (4th Cir. 1938).

4. Even if the judgment below is not *res judicata* on all issues now before the District of Columbia Circuit and even if petitioner were found to have standing to bring the review proceeding, the only question properly subject to review is the Commission's refusal to impose a condition in the license affirmatively excluding petitioner's lands from the project; and the Commission was under no legal compulsion to impose any such condition. Moreover the question was rendered moot by the Commission's Order of May 5.

In applying for rehearing on the January 30 order, the only objection made by petitioner to the order was its failure to "exclude the lands of the Tuscarora Indians" from the scope of the license and the only relief sought was such exclusion.

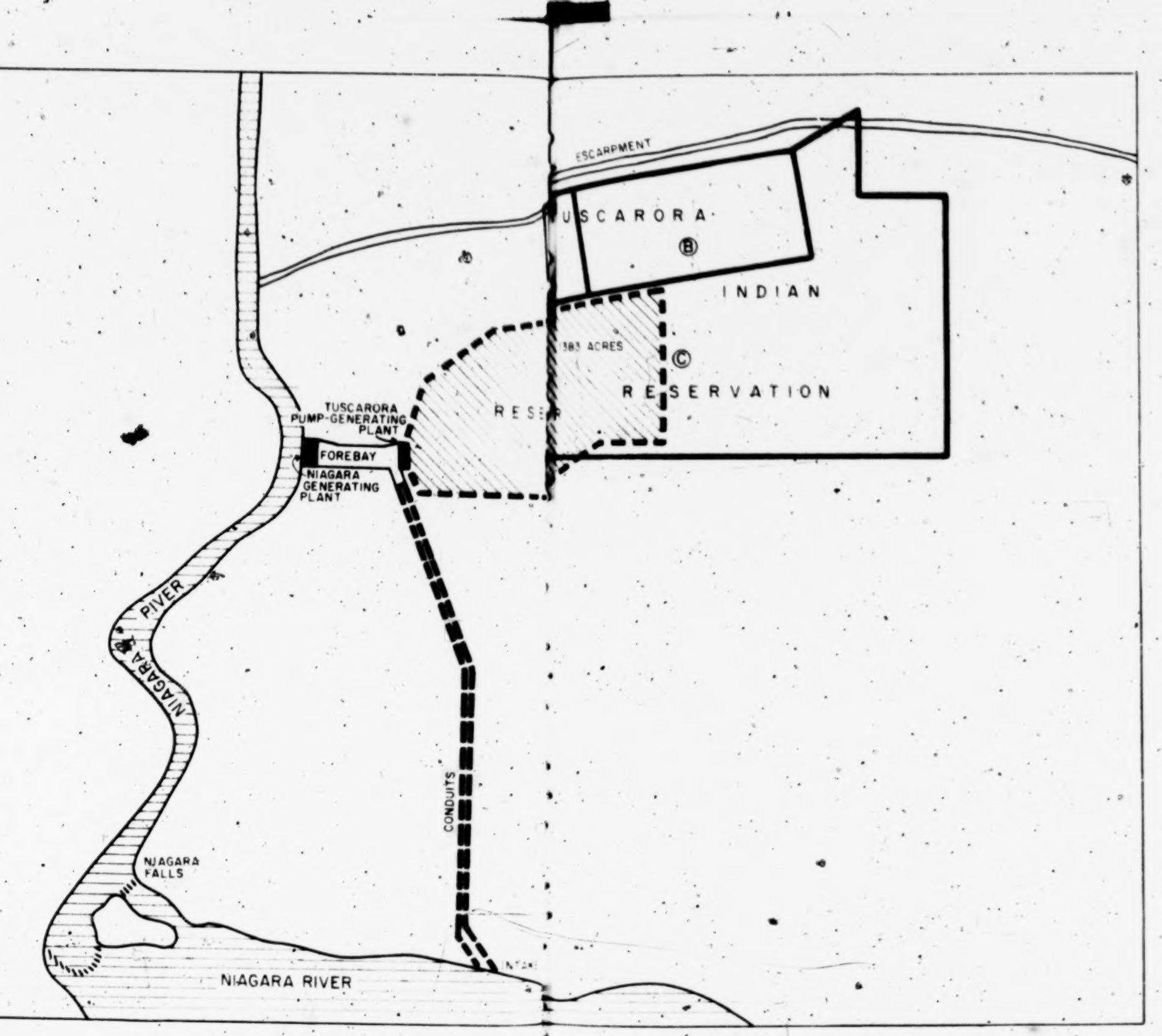
The Act of August 21, 1957 (Public Law 85-159, 71 Stat. 401) authorizing the project, prescribes some conditions to be included in the license "in addition to those deemed necessary and required" under the Federal Power Act. Section 10 of the Federal Power Act prescribes additional conditions and in paragraph (g) provides for:

> "Such other conditions not inconsistent with the provisions of this Act as the Commission may require."

Neither act directs the imposition of the type of condition sought by petitioner and the Commission did not err in refusing to include it in the January 30 order. Whether or not such a condition is to be inserted is essentially an administrative function. Federal Power Act § 10(g); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 (1952); *Metropolitan Edison Co.* v. *Federal Power Commission*, 169 F. 2d 719 (3d Cir. 1948).

In reviewing a Federal Power Commission order issuing a license, no objection may be considered by the Court "unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for the failure to do so." (Federal Power Act § 313(b))

Therefore, in view of the content of petitioner's application for rehearing before the Commission, all that the Dis-


ESCARPMENT
TUSCARORA
INDIAN
RESERVATION
383 ACRES
TUSCARORA PUMP-GENERATING PLANT
FOREBAY
NIAGARA GENERATING PLANT
NIAGARA RIVER
CONDUITS
NIAGARA FALLS
NIAGARA RIVER

trict of Columbia Circuit can review is the Commission's refusal to exclude petitioner's land from the project at that point—a matter completely within the Commission's discretion.

In any event, in its May 5 order, not objected to by petitioner, the Commission affirmatively included petitioner's land in the project and thus made the firm determination sought by petitioner. This made moot the one objection to the January 30 order made in the application for rehearing and hence the one question conceivably subject to review by the Court.

5. There is no merit to petitioner's contention that the Commission erred in refusing to exclude petitioner's land from the project as licensed on the ground that it was a reservation of the United States and the Commission had failed to make findings required to be made in connection with licensing lands in such reservations.

In its application for rehearing on the Commission's January 30 order, petitioner contended that the Commission had erred in refusing affirmatively to exclude petitioner's lands from the Niagara Project because the Commission had failed to make the finding required by section 4(e) of the Federal Power Act in the case of reservations of the United States as defined in section 3(2) of the Act.

In its petition to the Court of Appeals for the District of Columbia Circuit for review of the May 5 order, petitioner asked the Court to remand the case to the Commission on the ground that the January 30 order was defective in its failure to contain such findings.

As we have shown the District Court and the Court of Appeals for the Second Circuit found this contention to be without merit. They were palpably right.

Section 4(e) of the Federal Power Act authorizes the Commission to issue water power licenses on (1) streams under the jurisdiction of Congress and (2) "*any part of the public lands and reservations of the United States*" (emphasis added). The statute provides that a license

> "shall be issued within any reservation only after a finding by the commission that the license will not

> interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: * * *"

In the case of the Niagara, the Commission issued a license because the river is a navigable and international stream under the jurisdiction of Congress. By its May 5 order approving "Exhibit J" it made the lands of the petitioner, which are the subject of this action, part of the project but it did so pursuant to the power delegated to it by Congress to issue licenses on streams under the jurisdiction of Congress. (Appendix, p. 13a).

Petitioner's lands do not constitute a "reservation of the United States". They were never owned by the United States and the United States has no interest in them.

Federal Power Act Sections 3(1) and 3(2) defining "public lands" and "reservations" make it abundantly clear that the type of reservation referred to in section 4(e) is a reservation *owned by the United States* and carved out of the public domain.

The Commission has always construed the statute in this way, as evidenced by Federal Power Commission Regulations, Section 4.40(g) prescribing the contents of applications for licenses and Section 4.41 prescribing the contents of "Exhibit F" and "Exhibit J" to such applications. See also *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 443-45 (1955); *Sioux Tribe* v. *United States*, 94 Ct. Cl. 150, 170, *aff'd*, 316 U. S. 317 (1942).

The Department of Interior advised the Federal Power Commission that petitioner's reservation is not under its jurisdiction and the Commission regarded this fact as lending additional support to its conclusion that petitioner's lands do not constitute a reservation within the meaning of Section 4(e). (Appendix, p. 15a).

II

The Court Below Was Clearly Correct in Upholding Respondent's Power to Acquire Petitioner's Land by Eminent Domain.

Petitioner admits that the United States may exercise the power of eminent domain over Indian lands, even when protected by treaty, *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641 (1890), but asserts that the Power Authority, an agent of the United States carrying out a public purpose of the United States under express Congressional mandate, cannot exercise the United States' power of eminent domain without specific Congressional authorization. It cites no authority whatever which supports this.*

By Public Law 85-159 (71 Stat. 401) Congress directed the Federal Power Commission to issue the Power Authority a license for a project extensive enough to make sensible use of all the Niagara water available to the United States. As the reports of both Houses indicate, (Sen. Report 539, 85th Cong. 1st Sess.; H. R. No. 862, 85th Cong. 1st Sess.) Congress was apprised of the fact that such a project would involve a storage reservoir. Material submitted showed that this would cover a large area near the Niagara River and the City of Niagara Falls. For example, the House Public Works Committee files still contain a document dated July 25, 1957, addressed to all members of the House indicating that the reservoir would have a capacity of 60,000 acre feet. Other documents submitted contained sketches

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* *United States* v. *2005.32 Acres of Land*, 160 F. Supp. 193 (D. S. Dak. 1958), shows only that Congress may provide for other means of acquiring particular Indian land. There government officials began condemnation despite a Congressional directive to negotiate with the Indians and, if negotiations were unsuccessful, to report the fact to Congress (Act of September 30, 1950, 64 Stat. 1093). The result of the case has now been reversed by the Congress (Act of September 2, 1958, Public Law 85-915).

showing the size and location of the reservoir. Congress refused to legislate on the details of the design and features of the project and delegated to the Commission the job of approving such features pursuant to the Federal Power Act. Congress made the Federal Power Act available to the Power Authority as licensee. It became vested with the rights given by Section 21 to acquire by eminent domain in Federal or State courts all land necessary for the project.

Petitioner's chief contention is that the case of *Elk* v. *Wilkins*, 112 U. S. 94 (1884) keeps Section 21 from applying to Indians because Congress did not specifically say that it should. Petitioner has apparently abandoned the contention made below that treaties prevent the taking of its land and therefore relies wholly on the proposition contained in the dictum in *Elk* v. *Wilkins* to the effect that general statutes do not apply to Indians unless so expressed as clearly to manifest an intention to include them. This dictum is long since outmoded. The *Elk* case held that Indians were not included in "all persons born or naturalized in the United States" as provided in the Fourteenth Amendment and that therefore they had no right to vote. The following cases have since held that general acts of Congress do apply to Indians or Indian lands:

Oklahoma Tax Commission v. *United States*, 319 U. S. 598 (1943);

Five Civilized Tribes v. *Commissioner*, 295 U. S. 418 (1935);

Shaw v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928);

People ex rel. Kennedy v. *Becker*, 241 U. S. 556 (1916);

Barker v. *Harvey*, 181 U. S. 481 (1901);

Albany v. *United States*, 152 F. 2d 266 (6th Cir. 1945);

Bailey, et al. v. *United States*, 47 F. 2d 702 (9th Cir. 1931);

Y-Ta-Tah-Wah v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900);

United States v. *Claus*, 63 F. Supp. 433 (W. D. N. Y. 1944);

Totus v. *United States*, 39 F. Supp. 7 (E. D. Wash. 1941);

Acosta v. *San Diego County, et al.*, 126 Cal. App. 2d 455, 272 P. 2d 92 (1954);

Anderson v. *Britton*, 212 Ore. 1, 318 P. 2d 291 (1957), *cert. denied*, 356 U. S. 962 (1958);

Keokuk v. *Ulam*, 4 Okla. 5, 38 Pac. 1080 (1894).

Section 21 of the Federal Power Act is of the broadest type of statutory provision. It is therefore directly analogous to the Internal Revenue Code which was held in *Five Civilized Tribes*, *supra*, to include the land and income of even a restricted Osage Indian within its scope. And the power of eminent domain is on an equal footing with the power to tax. Both are inherent attributes of sovereignty. *Miss. and Rum River Boom Co.* v. *Patterson*, 98 U. S. 403 (1879); *Kohl* v. *United States*, 91 U. S. 367 (1876). As this Court held in *Five Civilized Tribes*, where, as here, the language of a general act and the public policy underlying it are broad enough to include them, Indians must be specifically and unequivocally *excluded* to be exempt from its terms and conditions.*

Thus, in *Barker* v. *Harvey*, *supra*, the Court was called upon to consider whether Congress had intended to include Indians within the scope of an act invalidating Mexican grants to lands in California not claimed within two years of the act. This Court held that the failure of Congress to exclude these Indians, commonly known to be residents of the geographic area affected by the act, from

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* *Five Civilized Tribes* virtually overruled *Blackbird* v. *Commissioner*, 38 F. 2d 976 (10th Cir. 1930), cited and relied on by petitioner as *Chouteau* v. *Commissioner*. In *Five Civilized Tribes* the Tenth Circuit Court declined to follow the *Blackbird* precedent and its refusal was expressly approved by this Court (295 U. S. 418, 419). *Elk* v. *Wilkens* was cited to the Court in *Five Civilized Tribes*, and was the basis of the *Blackbird* holding which the Court rejected.

the scope of the act evinced an intent to have them *included* within the scope thereof. In holding an Indian within the scope of, and barred under, the terms of the act, this Court stated:

> "[A]s no action has been shown in relation to these particular Indians, or their claims to these lands, *it is fairly to be deduced that Congress considered that they had no claims which called for special action.*" (pp. 492-93) (emphasis added)

The true rule is that Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted. Therefore, Tuscarora land must be deemed included within the scope of Section 21 of the Power Act. If we were to assume *arguendo* Congressional consent to be necessary to the taking of petitioner's land the cases cited above show that this section constitutes all the Congressional "consent" necessary to the taking.

In any event, it is perfectly clear that when Congress enacted the Federal Water Power Act it anticipated that Indian lands would be necessary for licensed projects. It inserted provisions to protect Indians living on lands of the United States, but rejected a Senate amendment which would have required Indian consent to projects on lands ceded by the United States under an Indian treaty (59 Cong. Rec. 1534, 1564-1570). Senator Myers opposed the amendment because it would permit Indians to block a project. He said:

> "A man who owns a farm in fee simple has an absolute title to it, but it may be taken away from him by the courts by the process of condemnation for public use. Indians who hold land by treaty do not hold it by any more sacred right or any more absolute title than does an American citizen who owns his land in fee simple." (59 Cong. Rec. 1565).

Myers' view prevailed in conference:

> "The conferees saw no reason why water power use should be singled out from all other uses of

Indian reservation land for special action of the council of the tribe." (H. R. No. 910, 66th Cong.)

Petitioner suggests that the general wardship which the Government exercises over Indians for the purpose of keeping them from being exploited by the white man, particularly Section 177 of Title 25, which forbids white men to purchase Indian land except under the auspices of the Federal government, bars the taking of petitioner's land by an agent of the sovereign through the exercise of eminent domain.* Wardship statutes were not enacted to protect Indians from the government itself, but rather to protect them from strangers. In this case petitioner's land is being taken for a government purpose by a duly delegated agent of the government pursuant to Federal statutes permitting it.

Prior to this action Section 177 had never been held to apply to the exercise of eminent domain over Indian land in New York either by the Federal government or the New York state government. Indeed, it has never been held even to apply to the purchase of land by New York in its proprietary as distinguished from its sovereign capacity.

Section 177 has been in effect in virtually the same form since it was first enacted as Section 8 of the Act of March 1, 1793 (1 Stat. 330). During the entire period New York has condemned Indian land within its borders for all sorts of public purposes. *Wadsworth* v. *Buffalo Hydraulic Assoc.*, 15 Barb. 83 (N. Y. Sup. Ct., Niagara Co., 1853); *Jemison* v. *Bell Telephone Co.*, 186 N. Y. 493 (1906); *United States* v. *Cattaraugus County*, 74 F. Supp. 413 (W. D. N. Y. 1947); *O'Meara* v. *Comm'rs*, 3 Thomp. & Cook 235, *rev'd on other grounds*, 59 N. Y. 316 (1874); *France* v. *Erie R. Co.*, 5 Thomp. & Cook 12 (1874); *Button* v. *Snyder*, 7 F. Supp. 597 (W. D. N. Y. 1934); *Dixon* v. *State*, 4 Misc. 2d 76 (1956);

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*25 U. S. C. § 233 (Appendix p. 11a), also relied upon by petitioner to indicate that Section 177 is still effective, has not the remotest bearing on eminent domain.

Jones Cut Stone Co. v. *State*, 7 Misc. 2d 1048 (1957): Reports of New York Attorney General (1904) 394, (1931) 324 and 358, (1941) 266, (1944) 376; New York Indian Law, Sections 12 and 90, New York Highway Law, Section 53.*

As stated by the court below, the Power Authority as a licensee of the Federal Power Commission is taking petitioner's land as an agent of the sovereign United States. If for 180 years New York could take such land for state purposes, *a fortiori*, an agent of the Federal Government can do so for Federal purposes.**

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* As pointed out at p. 7, *supra*, petitioner's lands which are the subject of this action were never owned by the Federal Government and are not protected by any treaty.

Congress has provided procedures for the condemnation of Indian land in the West where the Federal Government owns the underlying fee or holds the land in trust for the Indians, e. g., 25 U. S. C. §§ 311, 328; 43 U. S. C. §§ 599, 961. It has established no procedure for condemning Indian land in New York except that contained in Section 21 of the Federal Power Act. Cases which require that the Federal Government be a party to condemnations involving Indian land because the Government is the owner of it do not apply. *cf. Minnesota* v. *United States*, 305 U. S. 382 (1939); *United States* v. *Colvard*, 89 F. 2d 312 (4th Cir. 1937).

** The Power Authority acquired the land needed by the Seaway Development Corporation (established under Public Law 358, 83rd Cong., 68 Stat. 92, 33 U. S. C. §§ 981 *et seq.*) for navigation purposes in the area of the St. Lawrence River where the joint power-seaway project was constructed (*infra*, p. 31). The St. Regis Indian Reservation is downstream from that area and there the Seaway Corporation took Indian land by condemnation in the District Court. (*St. Lawrence Seaway Development Corporation* v. *88.57 Acres of Land, et al.*, N. D. N. Y., Civ. No. 6442—1957; *St. Lawrence Seaway Development Corporation* v. *8.51 Acres of Land, et al.*, N. D. N. Y., Civ. No. 6846—1957). It had no authorization except the general power of eminent domain.

III

The Part of the Judgment Below from Which Respondent Johnson as Superintendent of Public Works of the State of New York Has Appealed Will Be Rendered Moot in Practical Effect if the Petition for Certiorari Is Denied.

Johnson's appeal from the part of the judgment below setting aside proceedings taken to appropriate petitioner's land is based upon a proper concern by the New York Attorney General that some of the language in the opinion upon which the judgment was based, suggesting that Section 177 of Title 25 applies to transactions of the State of New York, will put in jeopardy titles to a great deal of land purchased by the State from Indians as well as the sites of many public improvements which the State acquired by eminent domain.

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138)—the first such Act passed after the adoption of the Constitution—specifically provided that states could not purchase Indian lands except at treaties held under the authority of the United States. The Act of March 1, 1793 (1 Stat. 330) superseded the 1790 Act and Section 8 was in virtually the same form as the present Section 177 of Title 25. (These statutes are contained in Appendix to this brief, pp. 10a-11a). The 1793 statute eliminated the prohibition against states purchasing land from Indians and merely provided that states could purchase land at treaties held by the United States on occasions when they had agents present. This was never considered to be an exclusive method for the State's purchase of Indian rights of occupancy in land of which the State owned the fee title as successor to the King of England.

Prior to 1790 New York bought Indian rights in a good part of the territory in upstate New York without Federal intervention and from 1793 to 1845 bought Indian rights in a great deal more of such land. During the latter period it carried out at least 38 treaties with the Indians at which no

Federal representative was present. Titles to much valuable property, including a good part of the City of Syracuse depends upon the validity of those treaties.

Such titles have always been sustained when challenged. The most recent case was decided by the New York State Court of Appeals on June 25 of this year (*St. Regis* v. *State*, 5 N. Y. 2d 24 (1958)).

As stated at p. 28, *supra*, the State exercised eminent domain over Indian land throughout its history and prior to this action Section 177 was never held to forbid its doing so.

We, therefore, sympathize with the Attorney General's desire to have this Court make clear that the law as it was understood for 180 years still stands.

We also sympathize with his concern lest the opinion below cast doubt on the validity of the appropriation method of eminent domain which the State commonly employs. All the land for the New York State Thruway and the bulk of the land for the Power Authority's St. Lawrence River Power Project was acquired in the name of the State by appropriation. Similarly, most of the land needed by the Seaway Development Corporation for the navigation part of the St. Lawrence Project was thus acquired and transferred to the Corporation.

However, this case is not necessarily the occasion for a review by this Court of the questions raised by the Attorney General in Johnson's appeal.

In taking steps to acquire petitioner's land in the name of the State by appropriation, Johnson acted strictly in a ministerial capacity and his sole purpose was to make the land available to the Power Authority which needed it for its Niagara Power Project and will have to pay for it.

The Authority has abandoned efforts to obtain possession of the land by appropriation, has already acquired possession of part of it for transmission lines in the condemnation proceeding it brought in the District Court for

the Western District of New York and is perfectly content to acquire the balance in that proceeding.

As we have shown, it is in the public interest that the Authority obtain possession of the land without further delay and petitioner's application for certiorari is without merit.

If the petition is denied and the Authority is, therefore, able to obtain the land in the condemnation proceeding, the practical effect of the part of the judgment below from which Johnson appeals will be moot. We suggest that if this Court denies the petition for certiorari—as we believe it should—it can find a way of disposing of Johnson's appeal on the ground of mootness.

Conclusion

We respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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SAMUEL I. ROSENMAN,
GODFREY GOLDMARK,
HENRY S. MANLEY,
JOHN R. DAVISON,
SCOTT LILLY,
Of Counsel.

September 29, 1958.

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

October Term, 1958

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, Petitioner, v. POWER AUTHORITY OF STATE OF NEW YORK, *et al.*	On Application for Stay of Mandate Pending Petition for Certiorari.

[September 8, 1958.]

MR. JUSTICE HARLAN, Associate Justice.

Petitioner Tuscarora Nation of Indians asks me to stay the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of Tuscarora's petition for certiorari to review the judgment of that court, filed July 24, 1958, which so far as now material (1) adjudged that respondent Power Authority of the State of New York, as licensee of the Federal Power Commission for the construction of the so-called Niagara Power Project at Niagara Falls, New York, has the right under § 21 of the Federal Power Act, 16 U. S. C. § 814, to acquire petitioner's land by condemnation proceedings, and (2) directed any federal district court in which such proceedings might be instituted to proceed with as much expedition as possible.

On August 26, 1958, the Court of Appeals, on petitions for rehearing and for clarification filed by Tuscarora and

the Power Authority respectively, adhered to its judgment, directed that its mandate issue six days thereafter, and rendered inoperative, upon the issuance of the mandate, certain stay orders which had theretofore restricted in some respects the Authority from entering upon the Tuscarora lands pending the outcome of condemnation proceedings to acquire them.

On August 27 the Power Authority commenced such condemnation proceedings in the United States District Court for the Western District of New York, and at the same time noticed for hearing before that court at 2 p. m. on Monday, September 8, a motion for summary judgment upon its complaint.

There is also pending undetermined in the Court of Appeals for the District of Columbia Circuit a proceeding instituted by Tuscarora to review the validity of the license issued by the Federal Power Commission to the Power Authority, insofar as it purports to include petitioner's lands within the Niagara Power Project. Both sides agree that the Court of Appeals' decision in this proceeding cannot be expected at the earliest before late November or December.

On August 31, in order to afford adequate opportunity for consideration of the application now before me, I temporarily stayed the issuance of the mandate of the Court of Appeals for the Second Circuit pending my decision on the application, and at the same time set the matter for oral argument on September 6.

Tuscarora concedes, as I think it must, that the validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Courts of Appeals for the District of Columbia Circuit. 16 U. S. C. § 825*l*(b); cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 334-337. That being so it is difficult for me to believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power Authority's right to acquire Tuscarora's

lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See §§ 3(2), 4(e), and 21 of the Federal Power Act, 16 U. S. C. §§ 796(2), 797(e), 814. Nevertheless in the time at my disposal I have not been able to satisfy myself completely that in this unusual situation four members of the Court would not be persuaded to grant certiorari, or that the Court, were certiorari to be denied, would not consider that Tuscarora was nevertheless entitled to some form of interim relief for the protection of the lands in question pending the outcome of the proceedings touching the validity of the Power Authority's federal license. I am particularly constrained not to reach such conclusions at this stage of the matter because of a number of factors which seem to me to point to a solution of this application that is fair to both sides.

The Power Authority represents that if it obtains from the District Court for the Western District of New York a decree of condemnation putting it into immediate possession of the Tuscarora lands, it will proceed forthwith to erect power lines around the site of the proposed reservoir which is part of the Niagara Power Project, and further that the Authority will be exposed to substantial financial losses if this work cannot be instituted by September 15. On the other hand the Authority states that it can defer, without serious inconvenience or financial loss, other aspects of the Project involving use of Tuscarora land at least until the middle of October.

I am advised by the Clerk of the Court that if Tuscarora's petition for certiorari and the Power Authority's response thereto are both on file by September 30 the matter may be considered by the Court at its first Conference of the new Term beginning October 6. In normal course this should enable the Court's action on the petition for certiorari to be announced on October 13.

Counsel for the Power Authority states that he will be prepared to file the Authority's response within 10 days after the filing of the petition for certiorari.

In light of the foregoing I shall make the following disposition of Tuscarora's present application: The mandate of the Court of Appeals for the Second Circuit shall be allowed to issue, but the execution and enforcement of the judgment entered pursuant thereto shall be stayed pending the filing and determination of Tuscarora's petition for certiorari, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject however to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

This disposition will enable Tuscarora to put its case to the full Court, without unduly tying the hands of the Power Authority in the interval.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Petitioner,

vs.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner for a stay of the issuance of the mandate of the United States Court of Appeals for the Second Circuit and of the opposition of respondents thereto, and after hearing the oral arguments of counsel,

IT IS ORDERED that the temporary stay of the mandate heretofore issued on August 31, 1958 be, and the same is hereby, vacated.

IT IS FURTHER ORDERED that, pursuant to the memorandum filed this day, the motion for a stay of the issuance of the mandate of the United States Court of Appeals for the Second Circuit is denied, but that the execution and enforcement of the judgment of the United States District Court for the Western District of New York entered pursuant thereto be, and the same is hereby, stayed pending the filing of a petition for a writ of certiorari by the petitioner, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof

for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject, however, to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that the petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

September 8, 1958.

APPENDIX B

Article I, Section 8 of the United States Constitution provides:

"Section 8. The Congress shall have Power . . .

". . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . "

Public Law 85-159, Act of August 21, 1957, 16 U. S. C. §§ 836, 836a, provides in pertinent part:

"§ 836. Authorization to license construction and operation; licensing conditions

The Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized

and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

* * *

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: * * *."

Sections 3(1) and 3(2) of the Federal Power Act, 16 U. S. C. § 796(1), (2), provide:

"§ 796. Words used in chapter defined

"The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;".

Section 4(e) of the Federal Power Act, 16 U. S. C. § 797 provides in part:

"§ 797. General powers of commission

"The commission is hereby authorized and empowered—

. . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: . . ."

Section 21 of the Federal Power Act, 16 U. S. C. § 814 provides in pertinent part:

"§ 814. Exercise by licensee of power of eminent domain

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary

to the construction, maintenance or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138) provided:

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

Section 8 of the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330) provided:

> "Sec. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treaty with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to pro-

pose to, and adjust with the Indians, the compensation to be made for their claims to lands within such State, which shall be extinguished by the treaty."

Section 177 of Title 25 of the United States Code (R. S. 2116) provides as follows:

"§ 177. *Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Section 233 of Title 25 of the United States Code (64 Stat. 845) provides as follows:

"§ 233. Jurisdiction of New York State courts in civil actions

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of

the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, that nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcemer of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

The Order of the Federal Power Commission issued January 30, 1958, licensing Project No. 2216 provides in pertinent part:

"The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The

Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive.

* * *

"*The Commission finds:*

"(1) The proposed project would affect navigable waters of the United States.

"(2) The project authorized herein consists of:

"(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits filed by Applicant, the approval of which by the Commission shall be as hereinafter provided.

"(b) All project works comprising: . . .

* * * *

"(4) The Tuscarora pumped-storage reservoir in the Town of Lewiston located adjacent to the pumping-generating plant having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet;

* * *

"*The Commission orders:*

"(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), . . .

* * *

. . . and subject to the following special conditions set forth herein as additional articles:

• • •

Article 33. The Licensee shall, not later than July 1, 1958, file for Commission approval revised Exhibits J and L drawings for the pumped-storage reservoir, for the cut and cover conduit system extending from the Conners Island intake structure to the Tuscarora forebay/afterbay; and for the open canal extending from the Tuscarora forebay/afterbay to the Lewiston forebay."

The Order of the Federal Power Commission issued March 21, 1958, denying petitioner's application for rehearing on the January 30th order, provides:

"On February 28, 1958, the Tuscarora Indian Nation (Intervener) filed application for rehearing of the Commission's order issued January 30, 1958, issuing license to the Power Authority of the State of New York (Licensee) to construct, operate and maintain a proposed hydroelectric redevelopment project to be located along the Niagara River in the State of New York. In its application for rehearing, intervener has requested modification of said order to exclude approximately 1,000 acres of land of the Tuscarora Indian Nation which the licensee proposes to acquire for reservoir purposes.

"By Public Law 85-159 (71 Stat. 401) we were directed to issue a license to the Power Authority of the State of New York for the Niagara redevelopment. The pumped-storage reservoir, which is part of the Niagara redevelopment, would have a storage capacity of 50,000 acre feet and would occupy about 2,800 acres of land. The best location of the reservoir would require approximately 1,000 acres of land owned by Intervener.

"In its application for rehearing Intervener contends that the Licensee lacks power to acquire Intervener's lands and that the Commission does not have power to authorize the Licensee to use them. However, Intervener also points out that the law on this question is unsettled in the light of Section 21 of the Federal Power Act.

"It is not unusual for a land owner to refuse to part with land which is necessary for some public purpose, a matter which Congress was aware of when it enacted Section 21 of the Act. The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question.

"Lastly, Intervener contends that the Commission did not make a finding required by Section 4 (e) of the Act relating to 'reservations' as defined in the Act. The status of Intervener's lands were discussed in a letter from an Assistant Secretary of the Interior to Intervener under date of November 1, 1957. The letter states that: 'As your reservation lands are under State jurisdiction, this Department is not in a position to present your case for you.' Since Intervener's lands are not within an Indian reservation under supervision of the Secretary of the Interior they are not part of a 'reservation' referred to in Section 4 (e) as defined in Section 3 (2) of the Act and the finding suggested by Intervener is not required.

"On March 18, 1958, Intervener filed a motion requesting us to stay our license order of January 30, 1958 'pending a decision on the Petition for Rehearing.' The motion was not filed in time to permit us to consider it prior to our consideration of the application for rehearing. In view of our denial herein of that application the motion for stay has become moot. Consequently, it should be dismissed.

"*The Commission finds:*

"The assignments of error and grounds for rehearing in the above-described application for rehearing set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its above-described order issued January 30, 1958, or which having now been considered warrant any change or modification of said order.

"The Commission orders:

"(A) The application for rehearing and modification of the Commission's order issued January 30, 1958, is hereby denied.

"(B) The motion for stay of the Commission's order issued January 30, 1958, is hereby dismissed."

The order of the Federal Power Commission issued May 5, 1958, approving "Exhibit J" to Power Authority's license, provides:

"On May 1, 1958, in compliance with Article 33 of its license for major Project No. 2216, Power Authority of the State of New York filed for Commission approval and inclusion in the license the following described project exhibit:

Exhibit J (FPC No. 2216-32) entitled 'General Map—Niagara Power Project'.

"The Exhibit J drawing is a general map of the entire project area, showing the location of the project works authorized by the license for Project No. 2216.

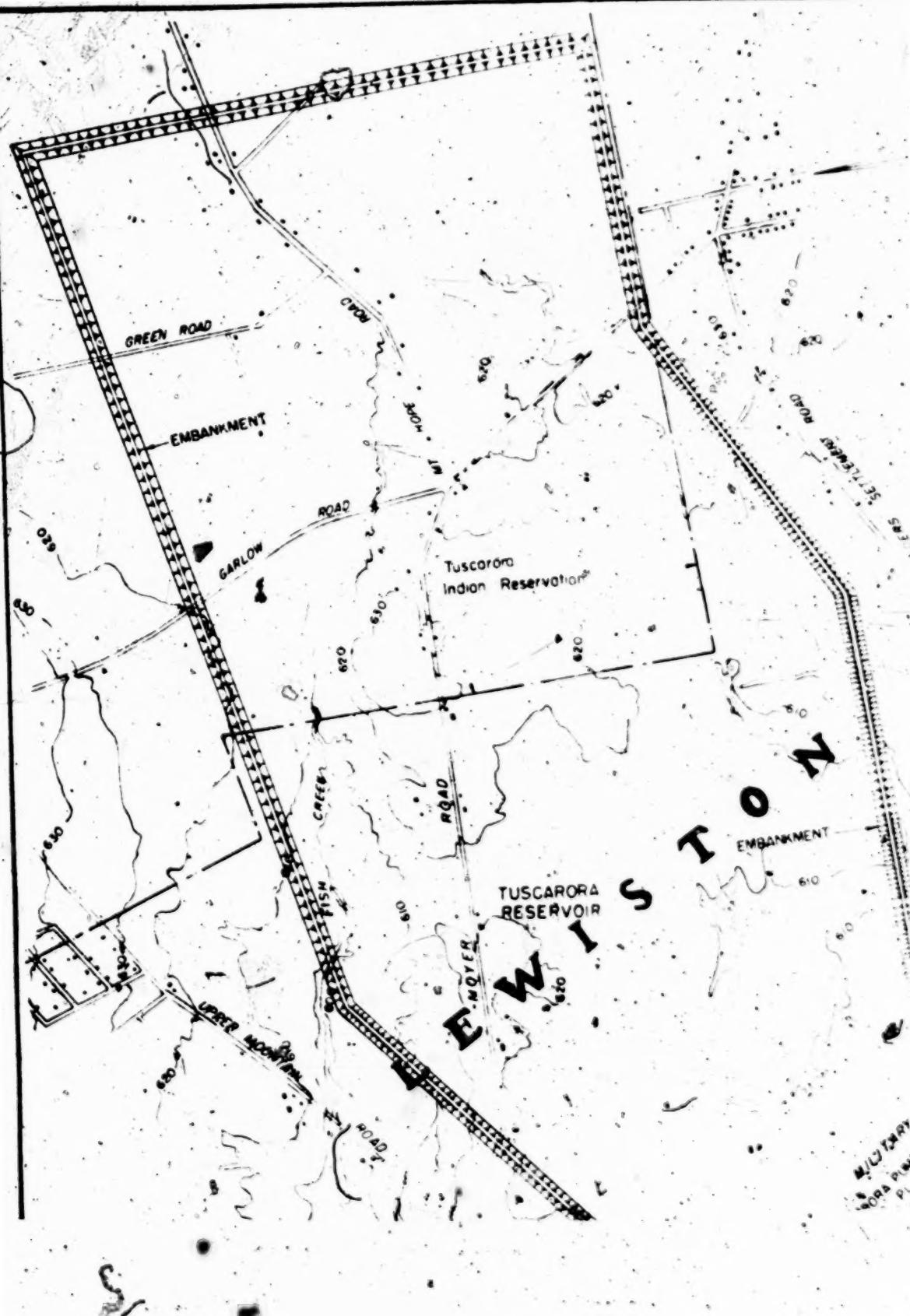
"The Commission finds:

"The above-described Exhibit J drawing conforms to the Commission's rules and regulations and should be approved as part of the license for the project.

"The Commission orders:

"(A) The above-described Exhibit J drawing is approved as part of the license for Project No. 2216.

"(B) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order."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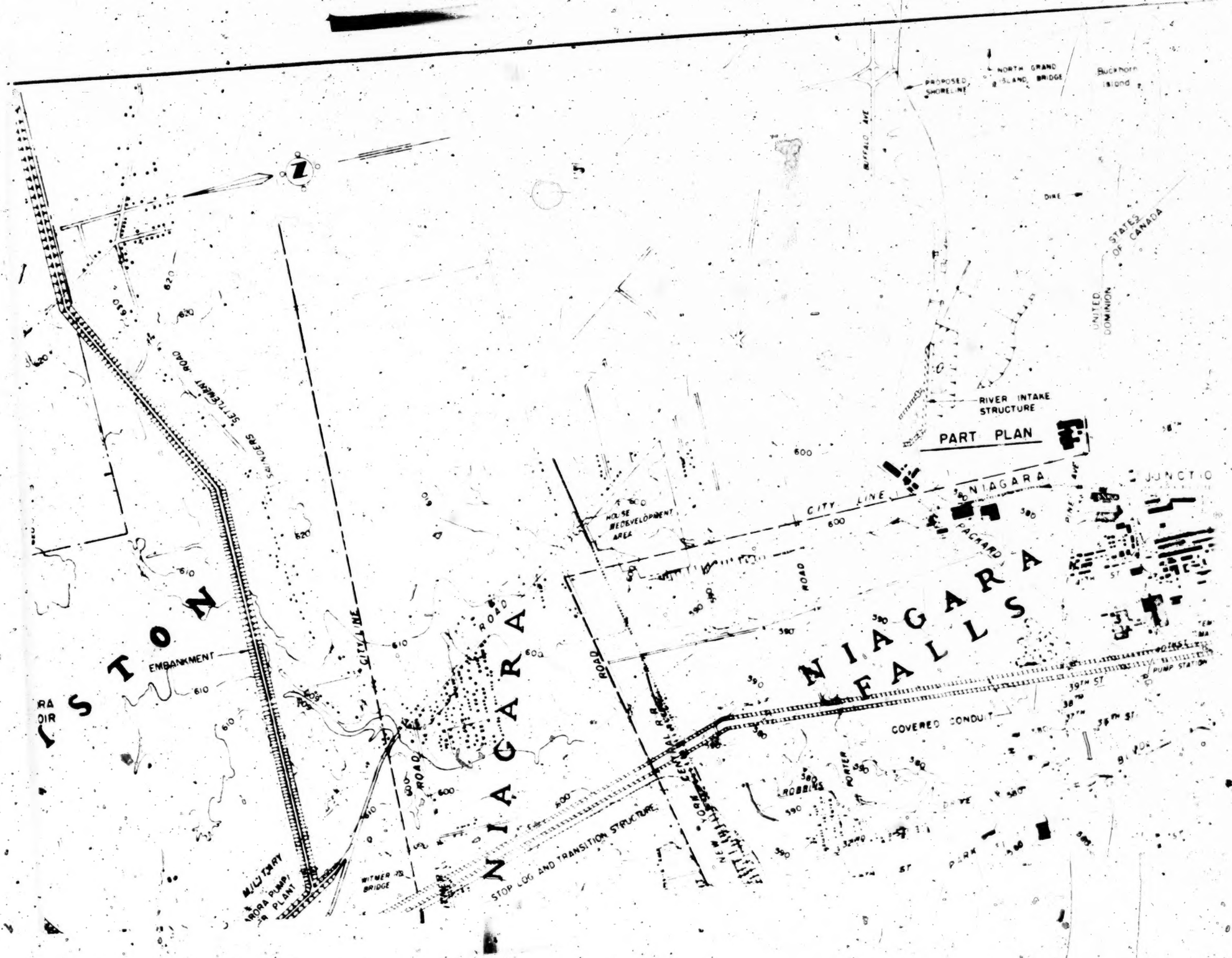
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NIAGARA
CITY LINE
HOUSE REDEVELOPMENT AREA
PACKARD
ROAD
COVERED CONDUIT
PUMP STATION
39TH ST
36TH ST
ROBBINS
PORTER
NEW YORK CENTRAL R.R.
STOP LOG AND TRANSITION STRUCTURE
WITMER RD BRIDGE
MILITARY
EMBANKMENT
SETTLEMENT ROAD
SAUNDERS
BUFFALO AVE
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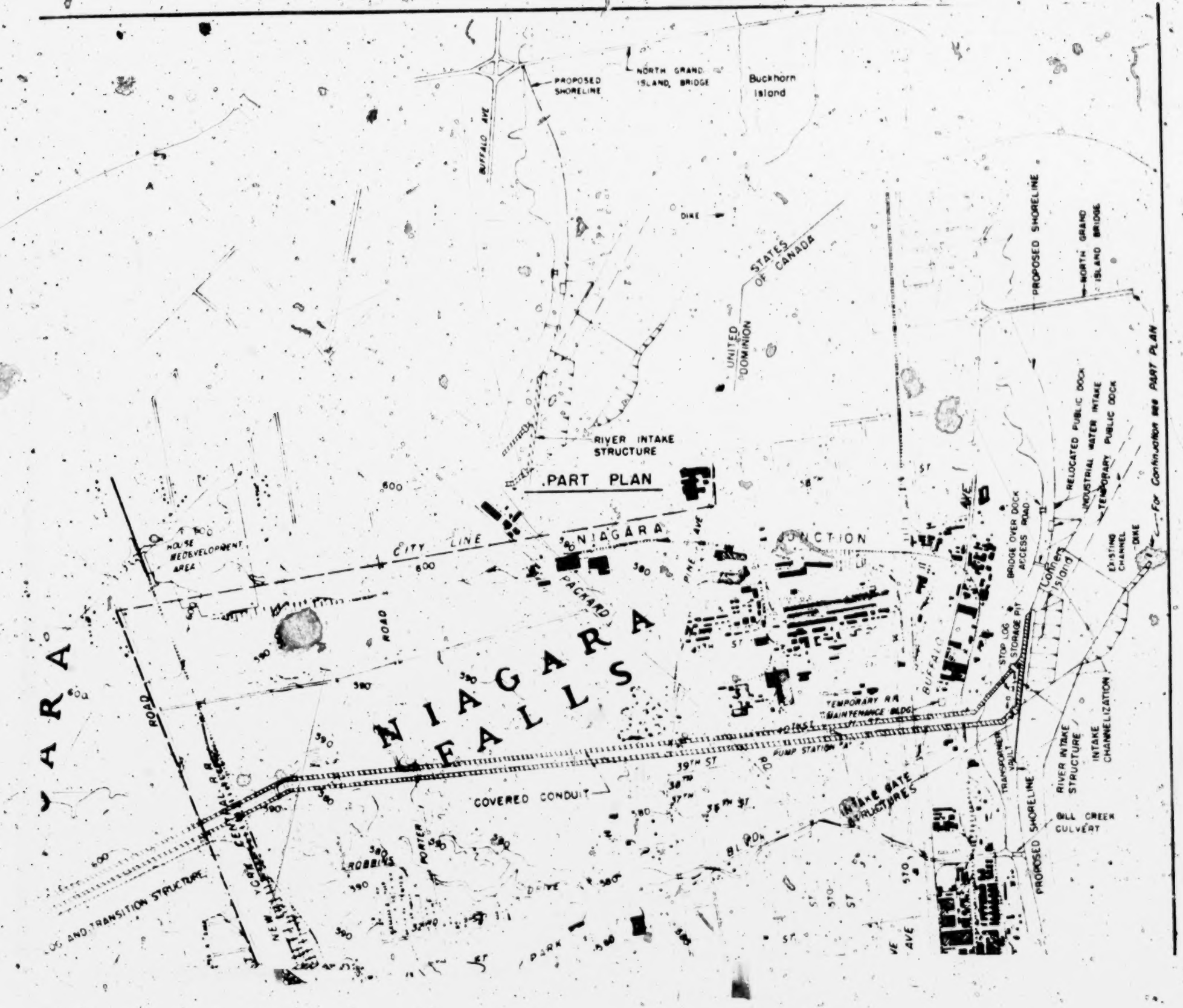
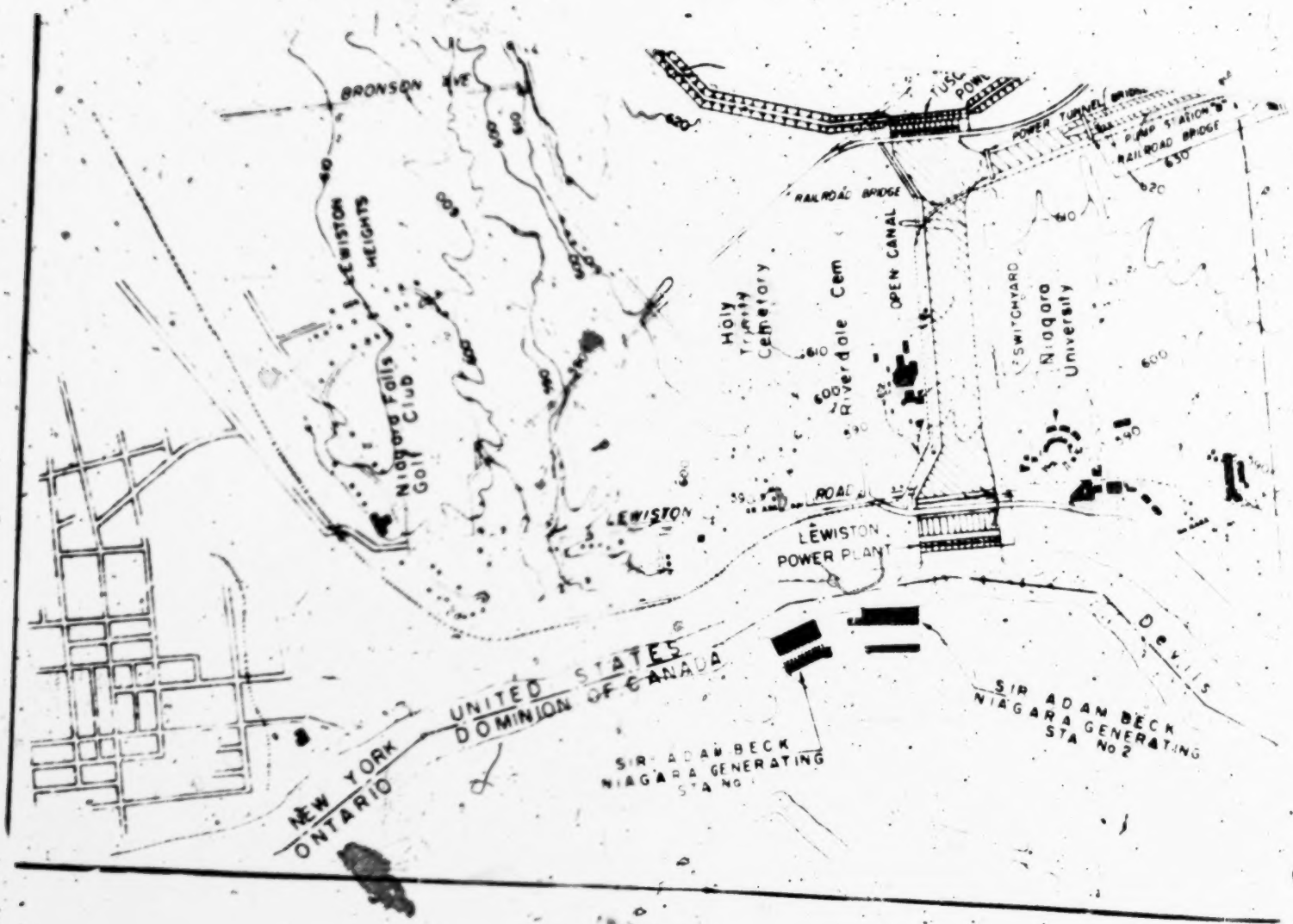

PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
Buckhorn Island
BUFFALO AVE
DIKE
STATES OF CANADA
UNITED DOMINION
PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
RIVER INTAKE STRUCTURE
PART PLAN
RELOCATED PUBLIC DOCK
INDUSTRIAL WATER INTAKE
TEMPORARY PUBLIC DOCK
For Continuation see PART PLAN
HOUSE MEDEVELOPMENT AREA
CITY LINE
NIAGARA JUNCTION
PACKARD
PINE AVE
BRIDGE OVER DOCK ACCESS ROAD
Conners Island
EXISTING CHANNEL
DIKE
NIAGARA FALLS
ROAD
STOP LOG STORAGE PIT
TEMPORARY R.R. MAINTENANCE BLDG
PUMP STATION "A"
39TH ST
COVERED CONDUIT
INTAKE GATE STRUCTURES
TRANSFORMER VAULT
RIVER INTAKE STRUCTURE
INTAKE CHANNELIZATION
PROPOSED SHORELINE
GILL CREEK CULVERT
ROBBINS
PORTER
DRIVE
PARK
NEW YORK CENTRAL R.R.
LOG AND TRANSITION STRUCTURE


BRONSON AVE
LEWISTON HEIGHTS
Niagara Falls Golf Club
Holy Trinity Cemetery
Riverdale Cem
OPEN CANAL
TUSC POWL
POWER TUNNEL
PUMP STATION
RAILROAD BRIDGE
RAILROAD BRIDGE
SWITCHYARD
Niagara University
ROAD
LEWISTON
LEWISTON POWER PLANT
NEW YORK
ONTARIO
UNITED STATES
DOMINION OF CANADA
SIR ADAM BECK NIAGARA GENERATING STA NO
SIR ADAM BECK NIAGARA GENERATING STA NO 2
DEVILS

APPENDIX C

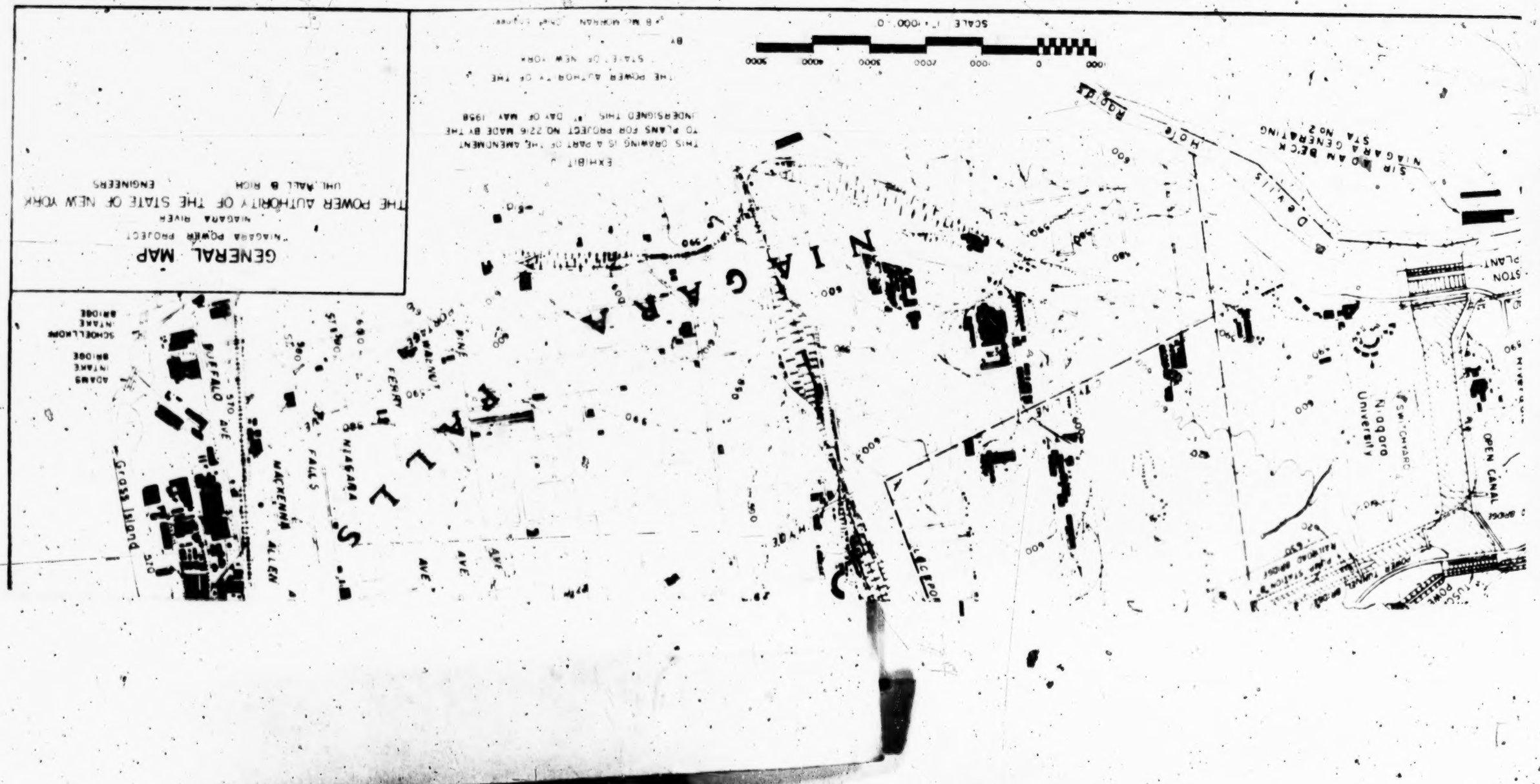



Exhibit J to Power Authority's Federal Power Commission License, approved by the